Metro Kajang Construction Sdn Bhd v Eka Bahtera Sdn Bhd

HIGH COURT (SHAH ALAM) — WRIT OF SUMMONS NO MT3–22–558 OF 1999

LOW HOP BING J

15 JUNE 2001

Civil Procedure *— Affidavits — Jurat — Jurat did not contain signature of interpreter, whether defective — Rules of the High Court 1980 O 41 rr 1(7), (8), 2(2) & Form 78(d)*

Civil Procedure *— Injunction — Interlocutory injunction, setting aside — Ex parte interim injunction lapsed — Whether application time-barred — Rules of the High Court 1980 O 29 r 1(2B)*

The plaintiff had on 27 May 1999 obtained an ex parte interim injunction against the defendant. The defendant had on 11 June 1999 applied by way of summons in chambers in encl 12 to set aside the said ex parte interim injunction. Enclosure 12 was supported by two affidavits viz encls 11 and 28, both of which were affirmed by Kwan Yoke Kian. The plaintiff raised two preliminary objections against the defendant's application in encl 12. The issues for determination were: (i) whether the jurats contained in encls 11 and 28 were defective for want of compliance with O 41 rr 1(7), (8) and 2(2) of the Rules of the High Court 1980 ('the RHC') as they did not contain the signature of the interpreter Yee Mei Ken; and (ii) whether encl 12 was barred by O 29 r 1(2B) of the RHC as the ex parte interim injunction had lapsed on 9 June 1999.

Held, dismissing the defendant's application with costs:

(1) Order 41 r 1(7) of the RHC requires that the jurat must be completed and signed by the person before whom it is sworn. The person before whom the jurat is to be sworn is a commissioner for oaths. It is therefore the commissioner for oaths who must also complete the jurat, and the jurat can only be completed by the commissioner for oaths, by filling the name of the interpreter in the two blanks in Form 78(d), ie twice. Both the jurats in encls 11 and 28 have not been completed by the commissioner for oaths. The jurat manifests only the name of the interpreter once, whereas there are two blanks in Form 78(d) for the name of the interpreter Yee Mei Ken to be entered, ie twice, before it can be said to have been 'completed … by the person before whom it is sworn' as prescribed in O 41 r 1(7) (see pp 134H–135A).

(2) The ex parte interim injunction may sooner be revoked or set aside, but the jurisdiction to invoke such revocation or setting aside may only be exercised so long as the aggrieved party, in this case the defendant, files an application before the expiry of the two-week life span of the ex parte interim injunction. In the

instant case, since the defendant had applied to set aside the ex parte interim injunction after it had lapsed, the application was time-barred as there was no longer any ex parte interim injunction in existence for the defendant to urge the court to set aside (see p 136C–F).

[**Bahasa Malaysia summary**

Plaintif telah, pada 27 Mei 1999, memperolehi satu injunksi interim ex parte terhadap defendan. Defendan telah, pada 11 Jun 1999, memohon melalui saman dalam kamar dalam lampiran 12 untuk mengetepikan injunksi interim ex parte tersebut. Lampiran 12 disokong dua afidavit melalui lampiran 11 dan 28, kedua-duanya disahkan oleh Kwan Yoke Kian. Plaintif membangkitkan dua bantahan awal menentang permohonan defendan dalam lampiran 12. Isu-isu untuk diputuskan adalah: (i) sama ada jurat-jurat yang terkandung dalam lampiran 11 dan 28 itu defektif kerana tidak mematuhi A 41 k 1(7), (8) dan 2(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') kerana ia tidak mempunyai tandatangan penterjemah Yee Mei Ken; dan (ii) sama ada lampiran 12 dihadkan A 29 k 1(2B) KMT kerana injunksi interim ex parte tersebut telah luput pada 9 Jun 1999.

Diputuskan, menolak permohonan defendan dengan kos:

(1) Aturan 41 k 1(7) KMT memerlukan jurat tersebut dilengkapkan dan ditandatangani oleh orang yang mengangkat sumpah di hadapannya. Jurat tersebut diangkat sumpah di hadapan seorang pesuruhjaya sumpah. Oleh itu, pesuruhjaya sumpah tersebut juga mesti melengkapkan jurat tersebut, dan jurat tersebut hanya boleh dilengkapkan oleh pesuruhjaya sumpah dengan mengisi nama penterjemah ke dalam dua ruang di dalam Borang 78(d), iaitu, dua kali. Kedua-dua jurat dalam lampiran 11 dan 28 belum dilengkapkan oleh pesuruhjaya sumpah. Jurat tersebut menunjukkan nama penterjemah tersebut hanya sekali, sedangkan terdapat dua ruangan di dalam Borang 78(d) bagi nama penterjemah Yee Mei Ken diisi dua kali, sebelum ia boleh dikatakan sebagai 'dilengkapkan ... oleh orang yang ia diangkat sumpah dihadapannya' seperti yang ditetapkan dalam A 41 k 1(7) (lihat ms 134H–135A).

(2) Injunksi interim ex parte tersebut boleh dibatalkan atau diketepikan terlebih dahulu, tetapi bidang kuasa untuk menggunakan pembatalan atau pengetepian sebegini hanya boleh digunakan selagi pihak yang terkilan, dalam kes ini defendan, memfailkan permohonannya sebelum peluputan jangka hayat dua minggu injunksi interim ex parte tersebut. Dalam kes ini, oleh kerana defendan telah memohon mengetepikan injunksi interim ex parte tersebut setelah ia luput, permohonan tersebut dihadkan

masa kerana tidak wujud lagi apa-apa injunksi interim ex parte bagi defendan mendesak mahkamah mengetepikan (lihat ms 136C–F).]

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on setting aside interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2216–2222.

Cases referred to

Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari [1997] 5 MLJ 359 (refd)

Gan Thing Phing v Ong Gek Kim (No 2) [1998] 7 MLJ 351 (refd)

GMX Associates Pte Ltd & Anor v Lee Yew Pooi (berniaga di bawah nama dan gaya Universal Trading Co) [1999] 1 AMR 125 (refd)

Han Euu Tiam v Phang Kui Fatt & Ors [1999] 4 MLJ 683 (refd)

Keet Gerald Francis Noel John v Mohd Noor @ Harun bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Kumaran C Raman v Radakrishnan CK Raman [1999] 6 CLJ 262 (refd)

Mohamed Mustafa a/l A Nalla Ibrahim & Anor v Syed Mohamed a/l Madar Rawther [1995] 1 AMR 125 (refd)

Legislation referred to

Rules of the High Court 1980 O 1 r 7, O 29 r 1(2B), O 14 rr 1(7), (8), 2(2)

Rules of the High Court (Amendment) 2000 PU (A) 342

HY Lee (*Ronnie Yap* with him) (*Ling & Theng Book*) for the plaintiff.
G Rajasingam (*Shearn Delamore & Co*) for the defendant.

Low Hop Bing J:

Preliminary objections

The plaintiff had on 27 May 1999 obtained an ex parte interim injunction against the defendant.

The defendant had on 11 June 1999 applied by way of summons in chambers in encl (12) to set aside the said ex parte interim injunction. Enclosure (12) is supported by two affidavits viz encls (11) and (28), both of which were affirmed by a deponent named Kwan Yoke Kian.

At the hearing of encl (12), two preliminary objections were raised on behalf of the plaintiff against the defendant's application in encl (12). These two preliminary objections are as follows:

1 The jurats containted in encls (11) and (28) are defective for want of compliance with O 41 rr 1(7), (8) and 2(2) of the Rules of the High Court 1980 ('the RHC'); and

2 Enclosure (12) is barred by O 29 r 1(2B) of the RHC.

All references to any order or rule in this judgment are references to the order or rule in the RHC.

Submission for the plaintiff

Mr HY Lee and Mr Ronnie Yap, both learned counsel for the plaintiff contended inter alia, that the respective jurat in the two affidavits affirmed by the deponent, ie Kwan Yoke Kian are defective as these two jurats did not contain the signature of the interpreter Yee Mei Ken and that there was no proof that the affidavits have been interpreted in the language that is understood by the said deponent. It was also argued for the plaintiff that the interpretation in the jurat was not completed and signed by the commissioner for oaths, who merely signed in respect of the affirmation of the affidavit.

The essence of the submission in respect of the second preliminary objection is that the ex parte interim injunction obtained by the plaintiff on 27 May 1999 has lapsed on 9 June 1999, ie at the end of the two weeks from the date on which it was granted and since the defendant's application was filed on 11 June 1999, the ex parte interim injunction was no longer in existence to be set aside. He added that the defendant's application in encl (12) is time barred.

Response by defendant

Encik G Rajasingam learned counsel for the defendant in response contended that O 41 of the RHC clearly does not require the interpreter or translator to sign a jurat. Similarly, he added that Forms 78(b) and (c) in Appendix A to the RHC contain no such requirement, so long as the contents of the affidavits have been duly interpreted by the interpreter.

Defendant's learned counsel was, however, prepared to concede that going by the case of *Han Euu Tiam v Phang Kui Fatt & Ors* [1999] 4 MLJ 683, the respective jurat in encl (11) and (28) would seem to be defective for reasons stated in that decision but learned counsel urged upon this court not to adopt the reasoning of the learned judge in that case as the court's attention was not drawn to O 1 r 7 of the RHC which allows variation to the forms in Appendix A to the RHC.

In respect of the second preliminary objection on the ground that the defendant's application in encl (12) was time barred, it was contended for the defendant that encl (12) was filed with the primary intention of setting aside the ex parte interim injunction obtained by the plaintiff on 27 May 1999 against the defendant. It was emphasized for the defendant that that ex parte order ought not to have been made in the first place ie it was obtained on the strength of misrepresented facts and misleading affidavits.

It was also submitted for the defendant that the ex parte interim injunction obtained by the defendant on 8 June 1999 was dissolved on the premise of the defendant's undertaking to comply with paras (a), (b) and (c) of the injunction. It was stated for the defendant that the ex parte interim injunction did not automatically lapse on the 14th day, ie 9 June 1999, as the undertaking could still be enforced by the plaintiff by way of committal proceedings.

It was further submitted for the defendant that there is nothing in O 29 of the RHC which requires the defendant to take out the application to set aside the ex parte interim injunction within the 14 days.

Decision of the court

The jurats

Both the jurats in encl (11) and (28) which were affirmed in support of the defendant's application in encl (12) contain the same wordings and are reproduced as follows:

> Diikrarkan oleh Kwan Yoke Kian yang tersebut di Kuala Lumpur pada 10 Jun 1999 menerusi terjemahan oleh Yee Mei Ken yang tersebut setelah mula-mula sekali bersumpah bahawa dia telah dengan sebenarnya, dengan nyatanya dan dengan dapat didengar menterjemahkan isi kandungan afidavit ini kepada deponen Kwan Yoke Kian dan bahawa dia akan sebenarnya dan sejujurnya menterjemahkan ikrar yang sedang hendak dikendalikan ke atas dirinya Kwan Yoke Kian yang tersebut itu.

[My translation:

> Affirmed by the said Kwan Yoke Kian at Kuala Lumpur on the 10 June 1999 through the interpretation of the said Yee Mei Ken having been first sworn that he had truly, distinctly and audibly translated the contents of his affidavit to the deponent Kwan Yoke Kian and that he would truly and faithfully interpret the affirmation about to be administered unto him the said Kwan Yoke Kian.]

The respective jurat appears to be in Form 78(d) of Appendix A to the RHC and is used for an affidavit by a person who does not understand English or Bahasa Malaysia: see *Gan Thing Phing v Ong Gek Kim (No 2)* [1998] 7 MLJ 351 at p 356. It was signed by Kwan Yoke Kian as deponent in juxtaposition to the jurat. And below the jurat in the presence of the commissioner for oaths, one Mr Massa Singh Gill.

For purposes of completeness, Form 78(d) is reproduced as follows:

> (d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the … day of …, 19 …. at … through the interpretation of … (if the interpreter is not a Court Interpreter add the following:
> 'the said … having been first sworn that he had truly, distinctly, and audible translated the contents of his affidavit to the deponent … and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said …).

Before me

…

Commissioner for Oaths

Upon a close scrutiny of the said jurat by reference to Form 78(d), it can be immediately observed that Form 78(d) would require the name of an interpreter who is not a court interpreter to be used twice, viz the first one to be included after the words 'through the interpretation of …' which name must be repeated after the words 'the said …'. However, this was not done by the learned counsel who drafted the abovesaid jurat and there appears to be an omission in both the jurats in encl (11) and (28). Therefore, a substantial issue was raised in respect of the jurats ie as to whether the jurats contained in encl (11) and (28) are defective for want of compliance with O 41 rr 1(7), (8) and 2(2) of the RHC. These rules are reproduced as follows:

O 41 r 1(7) of the RHC	:	Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.
O 41 r 1(8) of the RHC	:	A jurat must be in one of the forms in Form 78.
O 41 r 2(2) of the RHC	:	When the oath is administered to deponents in different languages there shall be a separate jurat for those sworn in each language.

In purported compliance with O 41 r 1(7) and (8) of thr RHC, the defendant as observed above, has apparently adopted Form 78(d). I shall consider this issue in greater detail later in this judgment as it raises an important point of practice and procedure. Order 41 r 2(2) of the RHC in my view would apply where there are multiple deponents, to whom the oath is administered in different languages, thereby requiring the use of a separate jurat for each of them to be sworn in each language. As both the jurats before me are for a single deponent and not for deponents affirming in different languages, I hold that O 41 r 2(2) of the RHC has no application here.

As alluded to above, an important point of practice and procedure is called into question in respect of O 41 r 1(7) and (8) of the RHC which require a more detailed discussion. Under O 41 r 1(7) of the RHC, it is mandatory for the jurat 'to be completed and signed by the person before whom it is sworn.'. What exactly do these words mean and require in the context of O 41 r 1(7) of the RHC? Giving these words their ordinary popular and grammatical meaning, it seems clear to me that the jurat must be completed and signed by the person before whom it is sworn. The person before whom it ie the jurat is be be sworn is a commissioner for oaths. It is therefore the commissioner for oaths who must also complete the jurat, and the jurat can only be completed by the commissioner for oaths, by filling the name of the interpreter in the two blanks ie twice. The pertinent question is

whether both the jurats in encls (11) and (28) have been completed by the commissioner for oaths. The answer is obviously in the negative. The jurat manifests only the name of the interpreter once, whereas there are two blanks for the name of the interpreter Yee Mei Ken to be entered ie twice, before it can be said to have been 'completed … by the person before whom it is sworn' as prescribed in O 41 r 1(7) of the RHC. There is a plethora of authorities to the effect that O 41 of the RHC contains provisions which are mandatory and a failure to comply therewith would render the impugned affidavit or affidavits defective and null and void.

By way of illustration, under O 41 r 3 of the RHC where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that:

(a) the affidavit was read in his presence to the deponent;

(b) the deponent seemed perfectly to understand it; and

(c) the deponent made his signature or mark in his presence,

and the affidavit shall not be used in evidence without such a certificate unless the court is otherwise satisfied that it was read and appeared to be perfectly understood by the deponent. The provisions of O 41 r 3 of the RHC were held to be mandatory in nature. In the circumstances, where O 41 r 3 of the RHC has not been meticulously complied with, as in *S Ravi a/l G Suppiah v Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 2 CLJ 152, I held that the affidavit is defective and shall not be used in evidence.

Order 41 r 1(7) and (8) of the RHC have been held by Mohd Hishamudin bin Mohd Yunus, J in *Han Euu Tiam v Phang Kui Fatt & Ors*, to be mandatory requiring strict compliance and a departure from the prescribed Form 78(a) was held to constitute a substantial deviation and defective and so inadmissible.

Similarly in *Gan Thing Phing v Ong Gek Kim (No 2)*, where the jurat does not state that the plaintiff has been translated the contents of his affidavits, the affidavits filed therein were disregarded by Kamalanathan Ratnam J.

Again in *Kumaran C Raman v Radakrishnan CK Raman* [1999] 6 CLJ 262, Abdul Kadir Musa J held that any omission of the fundamental requirements under O 41 r 1(7), (8) and (9) of the RHC would render any affidavit intended to be used in any application defective, unless and until it is cured by way of amendment with leave of the court.

Having carefully considered both the jurats in encl (11) and (28) and the above relevant provisions under O 41 r 1(7) and (8) of the RHC and Form 78(d), and judicial pronouncements, I hold that the above impugned jurats have not been completed by the person before whom it was sworn and therefore the affidavits are defective and hence hereby disregarded, in which case, there are no affidavits in support and so encl (12) is hereby dismissed in limine with costs.

However, on the assumption for a moment that I have erred in this finding, I shall now proceed to consider the second preliminary objection.

Has the ex parte interim injunction lapsed?

Order 29 r 1(2B) of the RHC provides as follows:

> Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse at the end of the two weeks from the date on which it is granted.

This was the governing rule prior to 23 September 2000 when the two weeks were substituted with 21 days (see Rules of the High Court (Amendment) 2000 PU (A) 342). Since the ex parte interim injunction in the instant case was obtained on 27 May 1999, the duration of two weeks under the old rule applied, so that unless sooner revoked or set aside, the ex parte interim injunction would have lapsed on 9 June 1999. the defendant's application in encl (12) was filed on 11 June 1999, ie two days after 9 June 1999.

The intention as enacted in O 29 r 1(2B) of the RHC is clear in that the life span of an ex parte interim injunction is two weeks, at the end of which it shall automatically lapse. The ex parte interim injunction may sooner be revoked or set aside, but the jurisdiction to invoke such revocation or setting aside may, in my view, only be exercised so long as the aggrieved party, in this case the defendant, files an application before the expiry of the two week life span of the ex parte interim injunction: *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 at p 310, per Siti Norma Yaakob JCA (now Federal Court judge).

In the instant case, since the defendant has applied to set aside the ex parte interim injunction after it has lapsed, the application is time-barred as there is no longer any ex parte interim injunction in existence for the defendant to urge the court to set aside. In *GMX Associates Pte Ltd & Anor v Lee Yew Pooi (Berniaga di bawah nama dan gaya Universal Trading Co)* [1999] 1 AMR 125 at p 130, Steve Shim Lip Kiong J (now CJ (Sabah & Sarawak) also held, inter alia, that under O 29 r 1(2B) of the RHC, any application to revoke or set aside an ex parte interim injunction has to be done within two weeks from the grant of the said injunction.

A similar conclusion was reached by James Foong, J in *Elias bin Mooin & Anor v Dato' Zainal Abidin bin Johari* [1997] 5 MLJ 359 wherein it was held, inter alia, that without an ex parte interim injunction in existence, by virtue of its automatic lapse upon the expiry of two weeks from the date it was granted, there could be no issue on damages.

The two weeks time frame enacted for the life span of an ex parte interim injunction is set and rigid: per Jefferey Tan JC (now J) in *Mohamed Mustafa a/l A Nalla Ibrahim & Anor v Syed Mohamed a/l Madar Rawther* [1995] 1 AMR 420.

In the light of the above abundant authorities, with which I agree, the obvious conclusion is that the defendant's application in encl (12) made after the two week period prescribed in O 29 r 1(2B) of the RHC is time barred.

Much has been said by learned counsel for the defendant that notwithstanding the lapse of the ex parte interim injunction on 9 June 1999,

A the defendant has on 8 June 1999 given an undertaking to the court in terms of para (a), (b) and (c) of the ex parte interim injunction and that a breach of such undertaking could be enforced by the plaintiff by way of committal proceedings against the defendant. However, the subject matter before me revolves around the construction of O 29 r 1(2B) of the RHC and its legal implications. Order 29 r 1(2B) of the RHC has made no reference to an
B undertaking. In my view, O 29 r 1(2B) of the RHC is not intended to cover an undertaking or a breach thereof. The limited scope enacted in O 29 r 1(2B) of the RHC covers and indeed is merely confined to an ex parte interim injunction and does not extend to any undertaking.

On the foregoing grounds, I hold that there are merits in the plaintiff's
C preliminary objections which are hereby upheld. The defendant's application in encl (12) is consequently dismissed with costs.

Defendant's application dismissed with costs.

Reported by Moy Saw Han

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